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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

DANIEL INGLE,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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QUESTIONS PRESENTED

1. Did the opinion and decision of the Arkansas Court of Appeals violate the Petitioner's Fourth Amendment reasonable expectation of privacy when it held that this search and seizure of this marijuana patch was valid as a search of an open field?

2. Was the Petitioner's Fifth Amendment right to remain silent violated when the Court of Appeals held that he was not the focus of the investigation and was therefore not entitled to be warned of his Fifth Amendment rights prior to being asked by officers who owned the property in question?

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IN THE

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DANIEL INGLE,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

OPINION BELOW

The opinion of the Arkansas Court of Appeals is reported at 8 Ark. App. 218 (May 18, 1983) (Advance Sheets). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Arkansas Court of Appeals was entered May 18, 1983, affirming the judgment of the Scott County Circuit Court sentencing Petitioner to five years in the Department of Corrections on the offenses of manufacturing a controlled substance and possession of marijuana with intent to deliver. Notice of filing for Writ of Certiorari to review was filed in the Arkansas Court of Appeals on May 31, 1983. A motion to stay the mandate of the Arkansas Court of Appeals and to remain on bond was filed in the Arkansas Court of Appeals on May 31, 1983. On June 15,

1983, the Arkansas Court of Appeals entered an order granting Petitioner's motion to stay the mandate and to remain on bond.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitutional Provisions involved are Amendments 4, 5, and 14 and can be found in U.S.C.A., Constitution, Amendments 4, 5 and 14, page 223.

Amendment 4 provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 provides as follows:

> No person * * * shall be compelled in any criminal case to be witness against himself, * * *.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

STATEMENT

On August 5, 1981, Petitioner was charged by Information with the offense of manufacturing a controlled substance by planting and growing marijuana and possession of marijuana with intent to deliver on August 3, 1981.

On October 15, 1981, Petitioner filed a motion to suppress evidence because of a warrantless illegal search of his land and seizure of marijuana therefrom because it violated his Fourth Amendment rights under the United States and Arkansas Constitutions. He also moved to suppress any incriminating statements made by him as fruits of the illegal search and seizure.

On February 2, 1982, a hearing was held on the motions to suppress. The State called as its witnesses, Officer Doug Stephens, Investigator Ron Lewis and Officer Don Taylor of the Arkansas State Police.

The testimony reflected that in April, 1981, the State Police received information from a citizen who had been there that Petitioner was growing marijuana on his land. The citizen requested that a search not be made until later lest his identification become known to Petitioner. Subsequently, the State Police confirmed the location of the land at the Scott County Assessor's Office and who owned it.

On August 3, 1981, several law enforcement officers in a four wheel drive vehicle came down Little Texas Road across a bridge over Weaver Creek, turned right onto a private unmarked, narrow road, crossed a shallow tributary of Weaver Creek, came to a place in the road on private land

where the road was blocked by rocks placed in the road plus a large tub placed there.

The officers dismounted the vehicle and traveled on foot to where they encountered a guard carrying a gun. They challenged the guard, arrested him, and took the gun from him, observed another man and a yellow guard tent. They also arrested this man. When they got to the tent they observed a few yards over the tent what they perceived to be a patch of marijuana.

They observed an irrigation hose in the patch that submerged into Weaver Creek and observed a water pump on the other side of the Creek. They retraced their steps around to the other side of the Creek and followed an electrical cord from the pump to a house trailer on the Ingle's property.

There, they encountered Petitioner, and without advising him of his rights, Officer Lewis asked him if the property was his. Petitioner answered that the property belonged to or was owned by him. Lewis, immediately after this question and answer, arrested Petitioner and advised him of his rights. Petitioner then moved to suppress this statement because he was not advised of his rights before the interrogation about who owned the property.

Subsequently, Officer Stephens came to the Waldron City Jail, advised Petitioner of his constitutional rights, and obtained an oral confession from him while he made handwritten notes, later dictated and had typed.

That same day, Officer Don Taylor with others went to the Ingle's residence and obtained a consent to search the property from Herman Ingle to search the premises, residence, area around the residence, including the barns and

vehicles. He did not consent to the search of the house trailers.

A search was made of a 1974 green and yellow Ford pickup behind and close to one of the house trailers. This vehicle belonged to Petitioner and marijuana was found therein.

At the close of the hearing on the motions to suppress, arguments were made by counsel and Petitioner requested that the Court suppress the evidence of the searches and seizures and any and all of Petitioner's oral incriminating statements. The Court denied the motions and on February 18, 1982, entered a formal order in accordance therewith.

On June 14, 1982, a jury trial was held and the fruits (marijuana) of the search and seizure were admitted in evidence plus the oral statement given by Petitioner to Ron Lewis that the property where the marijuana was found belonged to him and the statements given to Doug Stephens that were handwritten and typed.

The jury found Petitioner guilty of both offenses and fixed his punishment at five years in the Department of Corrections for manufacturing a controlled substance and seven years in the Department of Corrections for possession of a controlled substance with intent to deliver. On July 1, 1982, judgment was entered in accordance with the verdicts of the jury and the Court sentenced Petitioner to concurrent terms of five years in the Department of Corrections with two years of the seven year sentence suspended.

Petitioner appealed the judgment to the Arkansas Court of Appeals. He argued five points for reversal of the judgment among which were that his motions to suppress

the marijuana found and his oral statements to the police should have been granted.

On May 18, 1983, the Arkansas Court of Appeals delivered its opinion and decision affirming the judgment of the Scott County Circuit Court. It held that Petitioner did not have a reasonable expectation of privacy in the marijuana patch and that he was not protected by the Fifth Amendment when he made the oral incriminating statements to the officers.

On May 31, 1983, the Petitioner filed a Notice of Appeal, Notice of Filing for Writ of Certiorari to Review, and Motion to Stay the Mandate. On June 15, 1983, the Court stayed its mandate to permit this petition.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Court of Appeals.

ARGUMENT

QUESTION 1. Did the opinion and decision of the Arkansas Court of Appeals violate the Petitioner's Fourth Amendment reasonable expectation of privacy when it held that this search and seizure of this marijuana patch was valid as a search of an open field?

Petitioner believes that this question is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of this question.

This question brings into play two Fourth Amendment doctrines and their interaction. Was this an "open field" search and not protected as was held in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)? Or, did Petitioner have a "reasonable expectation of privacy" from this search as was held in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)?

Petitioner submits that this Court should examine these two doctrines in light of the facts in this case and ultimately hold that the *Hester* "open field" doctrine or test has been modified by *Katz* and that this modification requires suppression of the evidence in the case at bar.

Because an understanding of the facts leading up to this search and seizure is necessary for a plenary decision in this case, they will be set out in detail. These facts are set out below.

1. A citizen told the State Police in April, 1981 that the Petitioner had marijuana growing on his land.

2. He told the police not to search the land at that time because his identity would become known.

3. The State Police subsequently checked the assessor's records and determined that the Petitioner owned the land the citizen described that contained the marijuana.

4. It was subsequently decided by the State Police to search the area which was the West one-half, Northeast Quarter, Section 12, Township 2, Range 26, which was an 80 acre section, and was the second 80 acre section west of Yell and Scott County line on the south side of Little Texas Road.

5. No warrant was obtained to search the premises.

6. On August 3, 1981, several officers started to the property in a four wheel drive vehicle.

7. They were on Little Texas Road where they crossed a bridge over Weaver Creek.

8. They turned right on an unmarked, narrow, private road through a wooded area where it looked like a logging road.

9. They crossed a shallow water tributary of Weaver Creek.

10. They came to some rocks and a tub in the middle of the road which blocked the road.

11. They dismounted the vehicle and proceeded on foot.

12. The officers came upon a guard in the road with a gun who was guarding the property.

13. They challenged the guard, approached him, and took his rifle.

14. Officer Lewis asked the guard what he was doing in the area with a gun.

15. The guard stated that he was employed by or working for Shorty Ingle (Petitioner).

16. The officers observed through the underbrush another twenty yards down the road a yellow tent that was set up there.

17. When the officers got to the tent, they gazed over the top of it and saw the tops of some marijuana plants.

18. The officer then walked another ten yards, came upon a clearing where he found the marijuana.

19. He walked back to where the guard was and arrested him.

20. He returned to the marijuana patch, discovered another man, and arrested him.

21. The patch was searched and the marijuana was seized.

In deciding this type of case *Katz*, supra, reflects that the focus has shifted from "constitutionally protected areas" to whether the individual whose property was searched had a "reasonable expectation of privacy" in the area to be searched.

In determining the above, a two-pronged test is suggested: (a) that a person exhibits an actual (subjective) expectation of privacy, and (b) that the expectation be one that society is prepared to recognize as reasonable.

(A) Ingle clearly had a subjective expectation of privacy in the patch searched. Ingle has a private road, blocked by rocks and a metal tub, and an employed guard with a rifle to keep out trespassers, plus a guard tent. This is ample evidence of a subjective expectation of privacy.

(B) Ingle's expectation is one that society is prepared to recognize as "reasonable". Society's interest in law enforcement is not unduly hampered by requiring a warrant prior to searching a private field which has been reached through a private road, blocked by rocks and a metal tub and guarded by employed armed men, unless there is an imminent threat of destruction of the evidence or there exists a high probability that the evidence will cause serious bodily harm. There is no such emergency here. The police knew the marijuana existed for over five months from a citizen who observed it there, the police were in no hurry to search the property, they checked the property out at the assessor's office, yet, never attempted to get a warrant to search the premises.

In view of the above, Petitioner submits that the Arkansas Court of Appeals violated his Fourth Amendment rights when it refused to modify the "open field" doctrine of *Hester*, supra, by applying the "reasonable expectation of privacy" doctrine of *Katz*, supra.

Thus, this case involves an important and substantial issue. Some federal and state cases have recognized this modification and found a reasonable expectation of privacy in similar situations. *United States v. Williams*, 581 F.2d 451 (5th Cir.), *cert. denied, Williams v. United States*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed. 2d 789 (1979); *United States v. Debacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980); *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979); *State v. Wert*, 550 S.W.2d 1, 3 (Tenn. Crim. 1977); *State v. Brady*, 379 So. 2d 1294, 1296 (Fla. App. D4 1980); and *Burkholder v. Superior Court*, 158 Cal. Rptr. 86, 91 (1979). (See also the excellent discussion of this modification of *Hester*, supra, in

the dissent in *United States v. Oliver*, 686 F.2d 356, 361 (5th Cir. 1982). This dissent collects the cases on this point.)

The Arkansas Court refuses to apply the *Katz* "reasonable expectation of privacy" modification in a *Hester* "open field" situation. This Court should accept and look at this case and determine if this important Fourth Amendment doctrine was violated herein and in other similar cases. In other words, is *Katz* good Fourth Amendment law or is it to be discarded as the Arkansas Court of Appeals has done? It is important that this case be accepted for decision because an important federal question of violation of Fourth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

QUESTION 2. Was the Petitioner's Fifth Amendment right to remain silent violated when the Court of Appeals held that he was not the focus of the investigation and was therefore not entitled to be warned of his Fifth Amendment rights prior to being asked by officers who owned the property in question?

Petitioner also vehemently believes that this question is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of this question.

The Arkansas Court of Appeals did not understand Petitioner's argument on this issue and has permitted the officers to violate his Fifth Amendment right to remain silent when the investigation had reached the accusatory stage, had focused on the Petitioner, and the interrogator had substantial reason to believe the answer given was likely to be incriminating. (The Arkansas Appeal Court

even failed to follow the law in this situation as announced by the Arkansas Supreme Court in *Reeves v. State*, 258 Ark. 788, 528 S.W.2d 924 (1979).)

Because the Arkansas Court of Appeals did not understand this issue it refused to suppress this oral incriminating answer. That Court has refused to follow the teachings of the cases from this Court on the issue.

The Petitioner should have been advised of his Fifth Amendment rights prior to questioning about who owned the property under the holdings of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964).

The warnings were required because the investigation had reached the accusatory stage. The investigation had focused on the Petitioner and the officer expected an incriminating answer from the Petitioner. In *Roberts v. United States*, 445 U.S. 552, 559, 100 S.Ct. 1358, 63 L.Ed. 2d 622 (1980), the Court said if the officer has a substantial reason to believe the requested disclosure is likely to be incriminating that warnings are required.

What facts reflect this? 1. A citizen or confidential informant had told the police that he had observed marijuana growing on Petitioner's land. 2. Ownership of the land in Petitioner was confirmed at the assessor's office. 3. The guard at the marijuana patch told the officers that he was employed by or worked for the Petitioner. 4. The irrigation hose in the marijuana patch which led to the water pump, which led to the electrical cord, which led to the Petitioner's residence, which led to the Petitioner who was present at his residence. 5. The sheriff said the prop-

erty belonged to the Petitioner. 6. The Petitioner made the statement and was immediately arrested.

These six facts listed above clearly reflect that the investigation had reached the accusatory stage, the Petitioner was the focus of the investigation, and the officer expected an incriminating answer to his question about who owned the property. (Would the officers have permitted Petitioner to leave? The necessary answer is "no".) *Miranda* warnings were required, were not given until after the statement, and the statement should be suppressed and should not have been permitted in evidence at trial.

The Arkansas Court should have applied the law as contained in *Miranda, Escobedo,* and *Roberts,* supra. This Court should accept and examine this case in the light of these important Fifth Amendment issues and determine if there was a violation of the right to remain silent in this and similar cases. The principles of law announced by Petitioner herein are good Fifth Amendment law that has been violated by the Arkansas Court. Therefore, it is important that this case be accepted for decision because an important federal question of violation of Fifth Amendment rights of a Petitioner in this type situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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APPENDIX "A"

ARKANSAS COURT OF APPEALS

No. CA CR 82-199

DANIEL INGLE ..... *Appellant*

vs.

STATE OF ARKANSAS ..... *Appellee*

Opinion Delivered May 18, 1983

APPEAL FROM SCOTT CIRCUIT COURT

CHARLES H. EDDY, *Judge*

AFFIRMED

MELVIN MAYFIELD, *Chief Judge*

Appellant was charged with the manufacture of a controlled substance by planting and growing marijuana and with possession of marijuana with intent to deliver, in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976). He filed a pretrial motion to suppress based on the contention that evidence seized was in violation of his Fourth Amendment rights. After a hearing, the trial judge denied the motion. Upon trial, appellant was found guilty on both counts.

His first point for reversal is that the trial court erred in denying his motion to suppress as evidence marijuana found growing on his land. The testimony at the suppression hearing was that Officer Ron Lewis of the Arkansas State Police, acting on information from his supervisor, began a search for a marijuana patch in Scott County. He was accompanied by two other officers. According to the testimony, they traveled down an open road known in the

community as the Little Texas Road. They crossed a bridge and then took a narrow, unmarked road until they came to a point where it was blocked by rocks and a metal tub. They stopped the vehicle and got out and then observed, some fifteen or twenty yards away, a man with a gun. As Officer Lewis approached the man and looked around the area, he saw a yellow tent approximately twenty yards away. He walked up to the tent and over its top he could see growing plants of marijuana. It was later determined that the land was owned by appellant. Over 3,000 marijuana plants were pulled from the ground and the appellant contends this evidence was seized in violation of the Fourth Amendment to the United States Constitution and should have been suppressed.

In reviewing the action of the trial court in granting or denying motions for the suppression of evidence obtained by warrantless searches, we make an independent determination based upon the totality of the circumstances, but the trial court's finding will not be set aside unless it is clearly against the preponderance of the evidence. *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978); *State v. Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980).

In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court said that in determining whether a search and seizure has occurred within the meaning of the Fourth Amendment, made applicable to the states through the Fourteenth, "our lodestar" is *Katz v. United States*, 389 U.S. 347 (1967). The Court explained that, as noted by Mr. Justice Harlan in his *Katz* concurrence, Fourth Amendment protection normally involves two questions: The first is "whether the individual, by his conduct has 'exhibited an actual (subjective) expectation of privacy' ", and the second is "whether the

individual's subjective expectation is 'one that society is prepared to recognize as reasonable' ".

The appellant accepts and relies upon the above rules of law and urges us to follow the case of *United States v. Oliver*, 657 F.2d 85 (6th Cir. 1981) in applying these rules to the present case. Appellant, however, has overlooked the fact that rehearing was granted in that case and that the first opinion was reversed. See *United States v. Oliver*, 686 F.2d 356 (1982). In the second opinion the trial court's suppression of evidence, seized under circumstances much like those in the case at bar, was reversed. In so holding the court pointed out that *Hester v. United States*, 265 U.S. 57 (1924) held that the protection of the Fourth Amendment does not extend to open fields and the court said that "*Hester* is still good Fourth Amendment law". The court concluded:

> [U]nder *Hester* and *Katz* any expectation of privacy that an owner might have with respect to his open field is not, *as a matter of law*, an expectation that society is prepared to recognize as reasonable.

In *Gaylord v. State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), we followed *Hester* in holding no search warrant necessary because the marijuana patch discovered by the officers was in plain view and in an open field. In the instant case there was testimony that the marijuana was found in plain view on open land down a road accessible to the public. Thus, we agree with the trial court that no search warrant was necessary. Appellant's alternative argument that the yellow tent was a residence for guards and the marijuana patch a part of the curtilage is also rejected. The patch simply does not meet the definition of curtilage

given in *Gaylord* as "space necessary and convenient, habitually used for family purposes and for the carrying on of domestic employment".

After the marijuana patch was discovered, the officers traced an irrigation hose across a creek to a pump and followed an electrical cord from the pump to a house trailer. At this point they encountered the defendant and he was asked if the property belonged to him. Upon receiving an affirmative answer, they arrested him. Appellant's second point for reversal is that the trial court should have suppressed this answer because he was not advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Miranda* the United States Supreme Court said that general on-the-scene questioning as to facts surrounding a crime or other general questioning in the fact-finding process is not improper because in-custody interrogation is not involved. In *Beed v. State*, 271 Ark. 526, 543, 609 S.W.2d 898 (1980), the Arkansas Supreme Court said *Miranda* and its progeny were intended to inhibit police misconduct, not the making of incriminating statements. The case of *Parker v. State*, 258 Ark. 880, 529 S.W.2d 860 (1975), and the cases cited therein, allowed answers to be introduced into evidence where they were given by defendants without *Miranda* warnings even though the defendants were arrested immediately after answering questions asked by law enforcement officers. In those cases the court said that "police inquiry is purely investigatory and proper until the suspect is restrained in some way".

Appellant argues that the officers had substantial reason to believe that the requested disclosure was likely to be incriminating and, therefore, the *Miranda* warnings

should have been given before he was asked if the property was his. *Roberts v. United States,* 445 U.S. 552 (1980) is cited in support of that statement. It is hard to see how that case supports appellant's statement, and the statement is certainly not supported by *Beckwith v. United States,* 425 U.S. 341 (1976), where the United States Supreme Court indicated it was not impressed with the argument that *Miranda* should be extended to cover interrogation in non-custodial circumstances after a police investigation has focused on the suspect. The Court said that argument went far beyond "the custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements" of the *Miranda* decision.

In the instant case, when the police officers asked appellant if he owned the property, appellant had not been arrested nor had he been deprived of his freedom in any way. Hence, the answer he made was not the result of an in-custody interrogation, and was not subject to the *Miranda* rule.

Appellant also contends that the trial court erred in denying his motion to suppress evidence seized from his pickup truck. The vehicle was located on property owned by his father, who had given written consent to the officers to search the outbuildings, the residence, and the area around his residence, including the barns and vehicles. The vehicle in question was located approximately twenty-five yards from the father's residence. In the back of the truck there was a green vegetable substance which, according to one of the police officers, appeared to be marijuana. The appellant does not question the right of the police officers to search the premises and, as the State points out, the observation of evidence in plain view is not a search within

the meaning of the Fourth Amendment. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982). "The basic test is whether the officer had a right to be in the position he was when the objects seized fell into his plain view". *Kelley v. State*, 261 Ark. 31, 545 S.W.2d 919 (1977).

In the instant case, the marijuana in the back of the truck was within the plain view of the officers while they were rightfully on the premises. It was not error to refuse to suppress that evidence.

We have considered all the arguments made by appellant and are of the opinion that the judgment of conviction should be affirmed.

Affirmed.

APPENDIX "B"

IN THE ARKANSAS COURT OF APPEALS

DANIEL INGLE ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

No. CA CR 82-199

NOTICE OF FILING FOR WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Daniel Ingle, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on May 18, 1983, by the Arkansas Court of Appeals affirming the Judgment of the Scott County Circuit Court, dated June 14, 1982, and designates the entire Judgment, Opinion and Decision of the Arkansas Court of Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. Section 1257(3).

/s/ ROBERT S. BLATT
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Filed May 31, 1983.

Amendments. The 1980 amendment in subsection (b) added the second paragraph.

Rule 24.

COSTS—TAXATION

(a) Affirmance. — Appellee may recover brief cost at the amount allowed per page, not to exceed $300.00.

(b) Reversal. — Appellant may recover brief cost at the amount allowed per page, not to exceed $300.00, filing fee and record fee.

(c) * * *

[Amended by Per Curiam January 16, 1978; amended by Per Curiam July 7, 1980; amended by Per Curiam January 26, 1981.]

Compiler's Notes. In a Per Curiam of April 21, 1980, the Supreme Court stated: "Attorneys representing indigent persons in appeals to this court are requested to file motions for allowance of attorney's fees and expenses within 15 days after a mandate has been issued in the case. The motion should be accompanied by an affidavit stating the time spent in connection with the appeal, an itemization and explanation of all expenses incurred and a disclosure of any unusual problems in connection with the appeal. Motions not filed within 30 days of the issuance of a mandate will not be considered.

"It is extremely important that motions for payment of fees for services completed in a fiscal year be acted upon before the end of that fiscal year (June 30) because payment out of the appropriation for a fiscal year after the expiration of that year is at least subject to question. It is also doubtful that payment for services rendered in one fiscal year can be paid from the appropriation for the next fiscal year."

Amendments. Prior to the 1980 amendment, subsections (a) and (b) read as set out in the bound volume. The 1980 amendment in subsections (a) and (b) substituted "$300" for "$200."

The 1981 amendment substituted the present subsections (a) and (b) for those as amended in 1980.

Rule 29.

APPELLATE JURISDICTION OF THE COURT OF APPEALS

1. All cases heretofore appealable to the Supreme Court shall, from and after July 1, 1979, be appealed to the Court of Appeals, except that the following cases shall be appealed to the Supreme Court:

a. All cases involving the interpretation or construction of the Constitution of Arkansas;

b. Criminal cases in which the death penalty, life imprisonment, or a cumulative sentence of more than 30 years imprisonment has been imposed;

c. Cases, other than appeals from the Workman's Compensation Commission or from the Board of Review created by the Employment Security Law, in which the validity, interpretation, construction or constitutionality of an act of the General Assembly, an ordinance of a municipality or county, or a rule or regulation of any court, administrative agency or regulatory body is in question; declaratory judgment actions pertaining to the validity or applicability of a rule of an agency subject to the Administrative Procedure Act under Ark. Stat. Ann. § 5-705 (Repl. 1976);

d. Cases appealed from orders of the Arkansas Public Service Commission, the Arkansas Transportation Commission, and the Arkansas Pollution Control Commission, and cases involving rates for public utilities fixed by municipal authorities;

e. Appeals in cases based on petitions for post-conviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure;

f. Cases of quo warranto, prohibition, injunction or mandamus directed to state, county or municipal officials or to circuit, chancery or probate courts;

g. Cases pertaining to elections and election procedures;

h. Cases involving the discipline of attorneys-at-law and other cases arising under the power of the Supreme Court to regulate the practice of law;

i. Motions for rule on the clerk under Rule 5 of the Rules of the Supreme Court and Court of Appeals; and when the case in which relief is sought has not previously been docketed in the Court of Appeals and a transcript filed, motions or petitions for writ of certiorari to complete the record and for admission to bail;

j. Cases in which the current appeal is a second or subsequent appeal following an appeal which has been decided in the Supreme Court;

k. Interlocutory appeals permitted by statute or by the Arkansas Rules of Civil Procedure or of Criminal Procedure;

l. Cases involving substantial questions as to usury;

m. Cases presenting a question as to products liability.

n. Cases presenting a question about oil, gas, or mineral rights.

o. Cases presenting a question in the law of torts.

p. Cases presenting a question about the construction of deeds or wills.

2. An appellant who contends that his appeal should be heard in the Supreme Court pursuant to Rule 29 (1), instead of in the Court of Appeals, shall designate on his notice of appeal and designation of the record the applicable subdivision of Rule 29 (1) which gives the Supreme Court jurisdiction. In addition, appellant shall preface his abstract and brief with a jurisdictional statement not exceeding two pages in length.

3. The Supreme Court may transfer to the Court of Appeals any case appealed to the Supreme Court and may transfer to the Supreme Court any case appealed to the Court of Appeals.

4. The Court of Appeals may certify any case appealed to the Supreme Court, if the Court of Appeals finds that the appealed case:

a. is excepted from its jurisdiction by section 1 hereof;

b. involves an issue of significant public interest or a legal principle of major importance.

The Supreme Court may accept for its docket cases so certified, or may remand any of them to the Court of Appeals for decision.

5. No case filed in either the Supreme Court or the Court of Appeals shall be dismissed for having been filed in the wrong court, but shall be transferred or certified to the proper court.

6. No appeal as of right shall lie from the Court of Appeals to the Supreme Court. Certiorari may be granted by the Supreme Court for review of decisions of the Court of Appeals if, but only if, the Supreme Court determines that the case (a) should have come to the Supreme Court originally under section 1 of this rule, (b) should have been certified to the Supreme Court under section 4B [4b] of this rule, or (c) was decided in the Court of Appeals by a tie vote.

Petitions for review must be in writing and must be filed within 17 calendar days from the date of the decison. Petitions may be typewritten and shall not exceed two legal size, double-spaced, typewritten pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. Briefs will not be accepted and oral argument will not heard in support of petitions for review; however a party may attach to his petition for review a copy of his petition for rehearing in the Court of Appeals. Except in cases appealed to the Court of Appeals from the Workers Compensation Commission or the Employment Security Board of Review, no petition for review on the ground that the case involves an issue of significant public interest or a legal principle of major importance, as specified in subparagraph 4 (b) of this Rule, will be considered unless the party petitioning for review filed in the Court of Appeals, before the submission of the case to that court, a motion asking that the case be certified to the Supreme Court on that ground, with a certificate of counsel that the motion is filed in the good faith belief that the case should be so certified.

7. It is the intention of this court by the adoption of this rule to achieve an equalization of the appellate workload between the Supreme Court and the Court of Appeals. If the classifications made herein do not achieve this objective, adjustments will be made.

8. Except as herein provided, appeals to the Court of Appeals shall be taken in the same matter [manner] as heretofore provided for appeals to the Supreme Court.

9. This rule is adopted pursuant to Amendment 58 to the Constitution of Arkansas. [Adopted May 14, 1979; amended October 15, 1978; amended January 28, 1980, effective January 28, 1980; amended February 25, 1980; amended May 5, 1980; amended June 30, 1980; amended October 6, 1980; amended December 22, 1980, effective March 1, 1981; amended March 2, 1981, effective May 1, 1981; amended April 27, 1981.]

Compiler's Notes. The Per Curiam order of January 28, 1980, which amended this section, contained the following paragraph: "Any cases falling under subsections k, l and m which are now on the docket of the Court of Appeals and have not been taken under submission by that court should be certified by that court to the Supreme Court."

The Per Curiam order of January 25, 1980, entitled "Temporary Transfer of Jurisdiction," read: "In order to enable the Court of Appeals to establish and maintain currency in its docket, all appeals perfected between this date and July 1, 1980, in criminal cases in which the cumulative sentence imposed is five years or more, shall be lodged in the Supreme Court. The Court of Appeals may certify any such case now on its docket which has not been taken under submission by that court to the Supreme Court. After July 1, 1980, the jurisdiction of the two courts shall be as stated in Rule 29 of the Rules of the Supreme Court and Court of Appeals, as amended by Per Curiam order of this date."

The Per Curiam order of July 7, 1980 read: "In order to enable the Court of Appeals to maintain currency in its docket, all appeals perfected between July 1, 1980, and January 1, 1981, in criminal cases in which the cumulative sentence imposed is more than ten years, shall be lodged in the Supreme Court. After January 1, 1981, the jurisdiction of the two courts shall be as stated in Rule 29 of the Rules of the Supreme Court and Court of Appeals, as amended by Per Curiam order which is also entered on this date."

The Per Curiam orders of December 22, 1980 and March 2, 1981 read: "Many members of the bar apparently do not realize that a party may ask the Court of Appeals to certify a case to the Supreme Court for decision, under Rule 29 (4) (b). That option is not

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NO. 83-67

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

DANIEL INGLE,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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Q.C.-84-7127 45 COPIES

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY AN OPEN FIELD SEARCH AND SEIZURE OF MARIJUANA?

II.

WHETHER PETITIONER'S FIFTH AMENDMENT RIGHTS WERE VIOLATED BY NON-CUSTODIAL INVESTIGATORY QUESTIONING BY THE POLICE?

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OPINIONS BELOW

The opinion of the Arkansas Court of Appeals is reported at 8 Ark. App. 218 (May 18, 1983). A copy of the opinion is included in petitioner's appendix.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner has included the text of Amendments 4, 5 and 14 to the United States Constitution which are the only constitutional provisions applicable to his petition.

ARKANSAS RULES OF CRIMINAL PROCEDURE

RULE 13.2 Contents of Search Warrant.

(a) A search warrant shall be dated, issued in duplicate, and shall be addressed to any officer.

(b) The warrant shall state, or describe with particularity:

(i) the identity of the issuing judicial officer and the date and place where application for the warrant was made;

(ii) the judicial officer's finding of reasonable cause for issuance of the warrant;

(iii) the identity of the person to be searched, and the location and designation of the places to be searched;

(iv) the persons or things constituting the object of the search and authorized to be seized; and

(v) the period of time, not to exceed five (5) days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

Rule 14.2 Search of Open Lands.

An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.

STATEMENT OF THE CASE

Petitioner was charged by information with the manufacture of a controlled substance (marijuana) and possession with intent to deliver a controlled substance, in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976).

Petitioner moved to suppress evidence seized in an open field search and statements made before and after his arrest. A hearing was held on this motion and relief was denied.

A hearing was held on the suppression motions with the State presenting testimony from three officers of the Arkansas State Police. Petitioner did not testify or call on any witnesses in his behalf. The record does *not* reflect that

> [T]he State Police received information from a citizen who had been there that petitioner was growing marijuana on his land. The citizen requested that a search not be made until later lest his identification become known to petitioner. Subsequently, the State Police confirmed the location of the land at the Scott County Assessor's Office and who owned it.

Petitioner's Brief at page 3.

The record reflects only that information was received that marijuana was being grown in Scott County, that two officers were assigned to investigate this information and that some records were checked at the Assessor's Office before the officer physically tried to locate the marijuana. (T. 48, 78) There was no prior identification of the specific location of the land or of its ownership.

Appellant was tried before a jury and convicted on both counts. He was sentenced to five years for manufacture and seven years for possession with intent to deliver. The trial court suspended two of the seven years and ordered the sentences to run concurrently.

On appeal to the Arkansas Court of Appeals, petitioner raised the two issues which he now presents to this Court. The Arkansas Court of Appeals found the issue to be without merit and unanimouly affirmed the trial court's judgment. It is from this judgment that petitioner brings his petition for a writ of certiorari.

ARGUMENT

I.

PETITIONER DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN AN OPEN FIELD UPON WHICH MARIJUANA WAS DISCOVERED AND SEIZED.

Petitioner contends that marijuana was illegally seized without a warrant from an area in which he had a reasonable expectation of privacy. Petitioner did not present any evidence at the suppression hearing and at trial testified that he had nothing to do with the marijuana being grown in the field which *may* have been on his land. (T. 253-254) Without a proprietary interest, petitioner has no standing to challenge the search. *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

Appellee submits that this issue is controlled by *Smith v. Maryland*, 442 U.S. 735 (1979) and *Hester v. United States*, 265 U.S. 57 (1924) and that the record supports that the field in question was an open field in which petitioner had no reasonable expectation of privacy.

Testimony at the suppression hearing established that officers traveled down an open road in a wooded area until they came upon some large rocks and a metal tub obstructing their way. (T. 82-83) Officer Ron Lewis of the Arkansas State Police testified that they exited the vehicle and observed a subject in the road some fifteen to twenty yards away. (T. 83-84) Officer Lewis approached this subject and then saw a yellow object some twenty yards down the same road. (T. 85-86) Upon reaching the yellow tent, he observed the tops of marijuana plants and some ten yards further found a clearing with a large number of marijuana plants.

(T. 87-88) The officers did not cross any fences, open any gates or observe any houses in this area. (T. 85-86) There were no signs posted.

The State Police had been informed that marijuana was being grown somewhere in the area and had assigned two officers to try to physically locate it. (T. 76-77) There was no testimony at the hearing which indicated that the land was connected with the appellant as is stated in his brief, nor was there any testimony that the exact location of the marijuana field was known previously. If a search warrant had been sought at this point there would have been great difficulty in describing with particularity the place to be searched as is required by Ark. R. Crim. P. 13.2 (b) (iii). Such difficulty in rural settings has been recognized in *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977). Once the discovery was made on open land, down a road accessible to the public, there was no requirement that they then seek a warrant.

In *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978), the Arkansas Supreme Court adopted the standard of review applicable to issues concerning the suppression of evidence obtained by warrantless searches. As such issues present mixed questions of law and fact, deference will be given to the trial court's judgment and reversal will only result where the trial court's ruling is clearly against the preponderance of the evidence. Such is not the case at bar where the evidence clearly supports the court's ruling.

In interpreting the Arkansas Supreme Court's prior holdings in this area, the Arkansas Court of Appeals held in *Gustafson v. State*, 267 Ark. 830, 833, 593 S.W.2d 187 (Ark. App. 1979):

A search warrant of open land without a warrant is permissible. *Hester v. United States*, 265 U.S. 57 (1924); Rules of Criminal Procedure, 14.2 (1976). The Arkansas Court held that wooded areas are open land, *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975); even when the land in question belonged to the appellant, *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

In *Gaylord v. State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), the Arkansas Court of Appeals followed *Hester v. United States, supra*, in determining the test applicable to open field searches which is whether a defendant exhibits a reasonable expectation of privacy in the area of the search and seizure. In affirming the instant case, the Court followed both *Gaylord* and *Smith v. Maryland, supra*, which enunciated two questions applicable to Fourth Amendment protection; first, "whether the individual, by his conduct has 'exhibited an actual (subjective) expectation of privacy' ", and second, "whether the individual's subjective expectation is 'one that society is prepared to recognize as reasonable.' "

The record reflects no conduct on the part of the petitioner which exhibits any expectation of privacy. The only obstruction encountered by the officers were some large rocks and a washtub in the road. There is no testimony which establishes whether the obstacles were placed in the road or who might have placed them there. Certainly such obstacles are not what "society is prepared to recognize as reasonable." Otherwise, "the marijuana was found in plain view on open land down a road accessible to the public." 8 Ark. App. at 221.

Respondent submits that the Arkansas Court of Appeals correctly applied the Fourth Amendment pre-

cedents in *Hester* and *Smith* in determining that petitioner did not have a reasonable expectation of privacy in open accessible land.

II.

PETITIONER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED BY AN INVESTIGATORY QUESTION POSED BY THE POLICE IN NON-CUSTODIAL CIRCUMSTANCES.

Petitioner contends that his response to a question about who owned the property across the creek from his residence should have been suppressed as a violation of *Miranda v. Arizona*, 387 U.S. 436 (1966) as he was not advised of his rights prior to the question being asked. Respondent submits that the petitioner was not in custody at the time this question was asked, nor had the investigation reached the accusatory stage which would require that the officers advise the petitioner of his rights prior to asking any questions.

Petitioner again refers to facts without citation to the record and which respondent states are not present in the record, namely that an informant told police that marijuana was grown on appellant's land and that the ownership of the land was confirmed at the Assessor's Office.

Doug Stephens testified at the hearing that he had received some information that marijuana was being grown in Scott County (T. 48) and that some checking on the location was done at the Assessor's office. (T. 77) No reference was made to petitioner in this information. Officer Ron Lewis testified that after the field was discovered he followed an irrigation hose to Weaver Creek

where he observed a pump on the far side of the creek. (T. 89) Lewis and Trooper Westerman then walked back to Little Texas Road, over the bridge, back to the pump and followed an electrical cord to petitioner's residence. (T. 91-92) The sheriff arrived and supplied Lewis with the resident's name, not the name of the owner of the marijuana field as contended by petitioner. Lewis made contact with petitioner at his residence, explained who he was and that he was investigating marijuana growing across the creek. (T. 93-94) Lewis inquired who owned that property and when told that petitioner owned it, he placed him under arrest and read him his rights. (T. 94)

Petitioner alleges that he should have been read his rights prior to the question about the ownership of the property, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Reeves v. State*, 258 Ark. 788, 528 S.W.2d 924 (1979).

The United States Supreme Court in *Beckwith v. United States*, 425 U.S. 341 (1976), specifically rejected the argument that *Miranda* warnings should be required whenever an investigation has focused upon a defendant. 425 U.S. at 345-346. Where a suspect is not in custody and there are no circumstances indicating that an individual's will might be overborne by police conduct, the rationale of the exclusionary rule does not support an extension of *Miranda*. In *Beckwith*, IRS agents were interrogating a defendant in his home and he had been told of the criminal implications of their investigation. There was no indication that he was not free to leave or to tell the agents to leave.

In *Lacy v. State*, 271 Ark. 336, 609 S.W.2d 13 (1980), the Arkansas Supreme Court held that spontaneous remarks by a defendant did not require *Miranda* warnings. *Reeves v.*

State, supra, upon which petitioner relies, was distinguished in *Lacy* as involving a question of whether appellant was "in custody", rather than a question of whether he was being interrogated. The importance of being "in custody" was recognized by the trial court in the instant case. (T. 136) The question of whether a person is in custody is crucial in determining whether police conduct has shifted from an investigatory to an accusatory stage. When a suspect is in custody, the purpose of further questioning may be to elicit a confession and at that point *Miranda* warnings are necessary. *See Escobedo v. Illinois,* 378 U.S. 478 (1964).

In the case at bar, petitioner was not in custody. In *Reeves,* officers would not let the defendant leave or get out of their sight. Officers tried to put the defendant into a police car. Clearly, the defendant in that case was subject to police restraint. *Reeves* relies on *Orozco v. Texas,* 394 U.S. 324 (1969), another case in which there was testimony that a defendant was subject to some restraint and was "in custody" for *Miranda* purposes.

In the instant case, petitioner was not subject to any police restraint whatsoever. The ownership of the property was information which which would have inevitably been discovered by other means. Petitioner's admission of ownership was not a confession to having planted the marijuana. In fact, he denied having had anything to do with its cultivation at trial. (T. 253)

The officer did not have probable cause for an arrest based only on the electrical cord being traced to his residence. There were three homes at this site, not all the

occupants were responsible for the marijuana. It was the information that this occupant was also the landowner that gave the officer probable cause to arrest and at this point, the officer very properly advised the appellant of his rights.

Respondent submits that petitioner was not deprived of his freedom in any way when the investigating officer asked a routine question as to the ownership of the land. Therefore, *Miranda* does not preclude the admission of this statement as petitioner was not "in custody" and the case was still in an investigatory stage.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

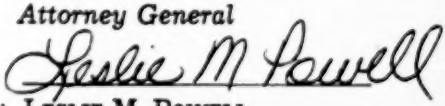
Although respondent recognizes that review of writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal.

Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the

petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

JOHN STEVEN CLARK
Attorney General

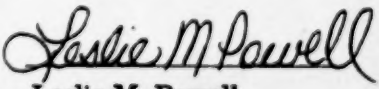


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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that I have served a copy of the foregoing brief for Respondent in Opposition To Petition, by mailing a copy of same by U.S. Mail, postage prepaid, to Mr. Robert S. Blatt, P.O. Box 1825, Fort Smith, Arkansas 72902, attorney of record for petitioner, this 13th day of October, 1983.



Leslie M. Powell